

Miami University School of Law

Employment Law (LAW246A) Spring 2020

Professor Andrew Elmore
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Class Hours: M/W 9:30-10:50
Classroom: E-265
Office Hours: T 2-3 p.m.; Th. 3-4 p.m. (G466)

Required Text

CRAIN, KIM, SELMI, WORK LAW: CASES AND MATERIALS, 3rd ed, (2015), additional readings to be distributed via course website.

Coverage

This class provides a survey of the law governing the employment relationship. The primary emphasis is the legal rights of the individual employee. The materials will touch on labor law and employment discrimination, but are not intended to provide comprehensive coverage of those areas of the law. Students interested in more in-depth treatment of those topics are encouraged to take Labor Law and/or Employment Discrimination instead of or in addition to this class. This class will also not cover employee benefits/ERISA.

Materials

The assigned readings are from the 3rd edition of Work Law: Cases and Materials, by Crain, Kim and Selmi, as well as occasional supplemental materials posted on TWEN.

The following reading schedule is the target for each day's class discussion. At times, due to student questions or particular difficulty with a topic, we may not complete all of the anticipated material for a particular class. I'll keep you up to speed via email and class announcements, but feel free to reach out at any time to clarify class assignments. If there is a need to adjust the syllabus, I will notify you in advance and post an updated syllabus on TWEN.

Office Hours

I will have drop-in office hours on Tuesdays from 2:00 to 3:00 and Thursdays from 3:00 to 4:00 in my office, G466. You can also email me directly (aelmore@law.miami.edu) with quick questions anytime, which I will answer by the end of the following business day.

Class Participation and Grading

Grading will be based primarily on a 4-hour, open-book examination during the final exam period. You will also be allowed to bring in up to 5 pieces of standard-size paper with whatever you want on both sides (i.e., 10 sides).

I'll use a panel system for class participation, starting on the second class. That means that a number of you will be designated participants for that day, and should expect to be called on. I won't cold-call people who aren't on the panel. If we don't cover all the material assigned to a panel, I may ask those panel members to be prepared to wrap it up in the following session.

Interim assignments, attendance and in-class participation will encompass 20% of your final grade. Three times during the semester I will post hypothetical fact patterns with questions. Assignment topics with due dates are posted in the syllabus below. Your written responses to these questions (no more than 500 words per assignment) will each be worth 4% (collectively, 12%) of your final grade. Attendance and in-class participation will count toward another 8% of your final grade.

Religious Holy Days

The University of Miami, although a secular institution, is determined to accommodate those students who wish to observe religious holy days. Classes missed due to observances of religious holy days will count as excused absences only if you provide written notice of your intended absence(s) to me no later than the end of the first three meetings of our class.

Disabilities

If you have a disability, or suspect that you may have a disability, the Law School encourages you to contact The Office of Disability Services for information about available opportunities, resources, and services. You may also visit the Office of Disability Services website at www.law.miami.edu/disability-services.

Title IX

The University of Miami seeks to maintain a safe learning, living, and working environment free from all types of sexual misconduct including but not limited to: Dating Violence, Domestic Violence, Sex- or Gender-Based Discrimination, Sexual Assault (including Sexual Battery), Sexual Exploitation, Sexual Harassment, and Stalking. For additional information about the University's efforts to prevent, stop, and address sexual misconduct, including resources and reporting options, please visit www.miami.edu/titleix or contact the University's Title IX Office at titleixcoordinator@miami.edu.

Attendance

At the beginning of each class, please sign the attendance sheet at the front of the room before taking a seat. If you do not sign your name for a given day, I will consider you absent. If you sign your name as present, this is an indication that you are present for the entire class session.

In general, you may take up to four absences for any reason; there is no need to inform me about such absences either before or after you take them. I reserve the right to enter an administrative withdrawal from the course for any student with five or more absences. Religious holidays do not count for purposes of the absence policy. If you miss class, please get notes from a classmate, check for any handouts or posted materials (e.g. slides), and then feel free to come during office hours to ask me any questions you have about the material covered in class. The class is taught in a cumulative fashion, and I frequently refer back to material covered earlier. So if you miss class or a day's readings, it will be helpful to catch up as soon as possible.

Use of Electronics During Class/Videotaping

You are permitted to bring a laptop to class, but [studies have consistently shown that laptop usage interferes with classroom learning and can harm your class performance.](#) Being a thoughtful notetaker is a vital skill for law students (and lawyers). Notetaking should help you process and condense the classroom discussion, rather than merely transcribing the class. In some classroom discussions I will instruct students to close laptops to encourage participation. I reserve the option to revoke laptop privileges in the event of students using laptops inappropriately during class, e.g. displaying offensive or distracting wallpaper, screen savers, or other material, or accessing email, games, news, videos, etc. Please remember to turn off phones before class. Any photographic, audio or video recording during class without my permission is prohibited. I will tape class if it is a make-up or under exceptional circumstances, but not for ordinary absences such as temporary illness, interviews, etc.

Unit 1: General Introduction

Class 1, Jan. 13: General Introduction and History of Work Regulation

Note: on the first day of class I'll give a general overview of the course, and we'll have a general discussion about the importance of work to individual and social wellbeing. Please come prepared to say a few words about what makes work "good" or "bad" in your mind, perhaps with examples from your past jobs, and to discuss the Lochner case.

Readings:

- The meaning of work: Karst excerpt and notes 1-5, pp 3-8
- The rise and fall of freedom of contract: *Lochner* and notes 1, 3, 5, 6, pp 9-21

- Note: *I'll assume familiarity with Lochner. In reading it, you need not focus on the constitutional analysis, but rather on the tension between freedom of contract and worker protection legislation.*
- The rise and fall of unionism (skim): pp 21-38
 - Note: *we will cover this in class two but will introduce it in this class.*

Class 2, Jan. 15: From collective to individual rights

- The individual rights model: intro and Stone excerpt, pp 38-39
- Defining the legal employment relationship
 - *O'Connor* & all notes pp 64-74 (beginning at “C”)
 - *FedEx* and *Alexander*, and notes 1, 4, 5, pp 74-96.
- Article about California’s A.B. 5 adoption of “ABC Test” to determine employee status (TWEN in course materials).

Unit 2: Employment at Will and Exceptions

Class 3, Jan. 22: Employment At Will and Contracts for Individual Job Security

- Employment at Will: Intro and Feinman selection, pp102-104, n5 pp 108-109
- *Savage* case & all notes, pp 109-113; just cause as an alternative, pp 113-116
- Written and oral contracts: pp 124-33 (includes case excerpts)

Class 4, Jan. 27: Contracting for Individual Job Security

- *Woolley* and *Asmus* & all notes to both cases, pp 133-151
- What is cause? Intro, *Cotran* & all notes, pp 151-160

Class 5, Jan. 29: Public Policy Limits on Termination

- The exception: introduction, *Sheets*, and all notes, pp 179-190 (pay close attention to the cases excerpted in n6)
- What constitutes public policy? Intro, *Hayes* and all notes, pp 191-99

Class 6, Feb. 3: Public Policy Limits on Termination

- What constitutes public policy (cont’d); *Gantt* and all notes, pp 199-207
- What is a discharge? *Strozinsky* and all notes, pp 212-215
- The relationship between statutory and common law remedies: pp 216-219

Class 7, Feb. 5: Collective Job Security under the NLRA

- NLRA Section 7 in the non-union workplace: *Washington Aluminum*, and *Timekeeping Systems* and note 1, pp 534-45; *Hispanics United* and all notes, pp 547-550; *Karl Knauz Motors* and all notes, pp551-560.

Class 8, Feb. 10: Collective Job Security: WARN Act, NLRA and the Common Law

- Intro materials, Greenwald excerpt, *Local 1330* case, and notes 1-5, pp 241-56
- Notice-and-layoff protections in WARN Act, 261-63; Plant closings & threatened closings in response to unionization efforts: *Darlington* and following materials covering *Gissel Packing* and *Fibreboard*, pp 281-291.

Unit 3: Balancing Employer and Employee Interests in the Workplace

Class 9, Feb. 12: Employee Mobility (I)

- Covenants not to compete: *Hopper* and all notes, pp 303-320
- Trade Secrets: *Militare* and all notes, pp 320-328
- Charles Duhigg, *Did Uber Steal Google's Intellectual Property?*, The New Yorker, Oct. 22, 2018, at <https://www.newyorker.com/magazine/2018/10/22/did-uber-steal-googles-intellectual-property>, pp. 1-18 (TWEN in course materials).

Class 10, Feb. 17: Employee Mobility (II)

- Inevitable disclosure: *Redmond* and all notes, pp 328-336
- The duty of loyalty: *Augat, Inc.* and notes 1-3, pp 336-340
- Employee inventions: *Wommack* and all notes, pp 345-351

*** First assignment (on employer protection of intellectual property) due by or before class 10.**

Class 11, Feb. 19: Dignitary Interests—Emotional and Reputational Harm

- IIED: Introductory materials, *Casas*, *Bodewig* and *Holloman* cases and all notes, pp 353-68
- Reputation/defamation: *Zinda* and *Chambers* cases and notes 1-3, pp 439-452.

Class 12, Feb. 24: Dignitary Interests—Privacy

- Public employees: *Ortega* and all notes, pp 368-77
- Private employees: Intro, *Trotti* and *Borquez* cases and all notes, pp 377-393

Class 13, Feb. 26: Dignitary Interests—Privacy and Autonomy

- Electronic communications: *Quon* and *Stengart* cases and other materials, including *Pure Power Boot Camp*, pp 398-420

Class 14, March 2: Dignitary Interests—Privacy—Off-duty Conduct, Monitoring

- Off-duty conduct and associations, *McCavitt* and all notes, pp 420-430
- Genetic Testing & Drug Testing, Monitoring & Data Analytics, pp 430-439
- Lisa Eadicicco, *Uber is Tracking Drivers' Phones to Watch for Speeding*, Time Magazine, June 29, 2016, at <http://time.com/4387031/uber-driver-app-tracking/> (TWEN in course materials).

Class 15, March 4: Employee Voice – Public Employees

- Estlund excerpt, *Pickering*, *Connick*, and *Garcetti* and all notes, pp 457-82

March 9-13: Spring Break

Class 16, March 16: Employee Voice—Private Employees/Whistleblowers

- The common law: *Novosel* and *Edmundson* cases and all notes, pp 482-93
- Statutory protections (for speech, against retaliation), pp 493-498

- Skim: whistleblower provisions of SOX (intro only), pp 498-501, and Dodd-Frank, pp 520-523

***Second assignment (on employee whistleblowers) due by or before class 16.**

Unit 4: Employment Discrimination and Other Equality Issues

Class 17, March 18: Discrimination – Individual Disparate Treatment

- Introduction, *McDonnell Douglas*, *Hicks* and all notes, pp 563-585
- Mixed motive, *Desert Palace* pp. 585-91
- “The elusive nature of discrimination, pp 600-603

Class 18, March 23: Discrimination – The BFOQ Defense, Disparate impact and Retaliation

- BFOQ defense, pp 617-619
- Disparate impact claims, including *Griggs* and all notes: pp 619-630
- Retaliation, especially *Burlington* in n. 4 597-600

Class 19, March 25: Sexual Harassment and Employer Responsibility for Harassment

- Intro, *Billings & Ellerth* cases and all notes 630-658

Class 20, March 30: Balancing Work and Family (and Gender Norms)

- Stereotypes about working mothers: *Back* case and notes, pp 755-760
- The FMLA: Intro, *Hibbs* and following material, pp 737-744
- The policy debate: Williams and Selmi/Kahn excerpts, pp 744-754

Class 21, April 1: Immigration and Employment

- Intro, Ansley, *Hoffman Plastic* and *Williams* cases and all notes, pp 699-727
- In-class exercise on employment discrimination law and the advancement of women in the legal profession.

Unit 5: The Legislative Safety Net

Class 22, April 6: Wages and Hours—History and definition of employment

- Introduction, pp 765-66
- Overview of FLSA provisions, pp 776-82 & 787-88 (state wage/hour laws)
- “Employment” under the FLSA:
 - pp 810-823, including *Heath* and notes
 - *Glatt et al v. Fox Searchlight Pictures*, 811 F.3d 528, 531-38 (2d Cir. 2016) (TWEN in course materials)
 - 823-25 (trainees and interns)
 - Notes 3, 4, and 8, pp 835-839

Class 23, April 8: Wages and Hours—Coverage

- Covered work: *Davis* and all notes, pp 839-47

- On call: *Dinges* but not notes, pp 847-51
- Other time measurement issues, including *Alvarez* and *Tum* cases, pp 854-64

***Third assignment (on employment discrimination and wage and hour law) due by or before class 23.**

Class 24, April 13: Wages and Hours—Overtime exemptions, enforcement

- Overtime: *review* pp 779-80, read pp 803-809 (Malamud excerpt & notes)
- Overtime exemptions, pp 864-84 (includes a number of cases)
- Enforcement, including retaliation, defenses, and FLSA collective actions, pp 782-87

Class 25, April 15: Workers' Compensation Overview

- Intro and “The Common Law Approach” but not *Farwell*, pp 919-21, note 3 pp 926-27
- “The Compensation Acts,” pp 928-29, including Larson selection, but not the *White* case
- Basic Benefits and Coverage, including *Prows*, pp933-44
- The fundamental bargain, including *Eckis* and notes, pp 949-54
- The intentional tort exception, including *Whitaker* and notes 1-2, pp 954-62

Class 26, April 20: Arbitration

- Intro and Richard Bales selection, 997-1000
- *Gilmer* and notes 1-3, 1006-1014
- Section D., including *Cole*, *Phillips* and *Alexander* cases and notes 1-2 following *Alexander*, pp 1015-1023
- FAA vs. the NLRA: *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (TWEN in course materials).

April 24-May 6 (EXAMS)